

DEWEY & LeBOEUF

Dewey & LeBoeuf LLP
1101 New York Avenue, NW
Suite 1100
Washington, DC 20005-4213

tel +1 202 346 8077
fax +1 202 956 3337
dturetsky@dl.com

September 26, 2008

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 07-42; MB Docket No. 07-198
EX PARTE

Dear Ms. Dortch:

On September 25, 2008, Mr. David Turetsky of Dewey & LeBoeuf LLP spoke with Michelle Carey of Chairman Martin's Office on behalf of HDNet LLC regarding reform of the Commission's programming carriage complaint rules, 47 C.F.R. §§ 76.1300 *et seq.*, under MB Docket No. 07-42. He reviewed proposed changes to the program carriage rules which previously had been submitted to the Commission as exhibits to Ex Parte filings by HDNet and others, e.g., Docket 07-42 on June 5, 2008. A copy of the proposed rule changes is attached for convenience. Mr. Turetsky noted also that proponents of these reforms had met with commissioners and that the FCC had received congressional input about changes.

Mt. Turetsky also discussed briefly the status of the wholesale unbundling proceeding, Docket No. 07-198, and noted that several meetings had been held with Commissioners regarding that matter.

Respectfully submitted,

/s/ David S. Turetsky

September 26, 2008
Page 2

David S. Turetsky
Dewey & LeBoeuf LLP
1101 New York Avenue NW, Suite 1100
Washington, DC 20005-4213
Counsel to HDNet LLC

cc: Michelle Carey

1. Establishment of a Shot Clock

Once a Complaint, Answer, and Reply are filed, there is neither a timeline for when the FCC will respond to the complaint nor when final resolution will take place. Proposed change to Section 76.1302:

(h) Deadlines for Commission Findings and Decisions

(1) The Commission shall make a determination as to whether a complainant has made out a prima facie case under this section within 30 days of the filing of a complainant's reply to a defendant's answer to a complaint, or the date on which such reply would be due if none is filed.

(2) The Commission shall issue a final order resolving a complaint found to have made out a prima facie case no later than 6 months from the date of the initial filing of the complaint.

2. Definition of Prima Facie Case

Currently, there is no definition in the rules of what constitutes a prima facie case. Consequently, defendants argue their own versions of the standard to try to get independent programmers' complaints dismissed. This lack of clarity is a problem for independent programmers who are in litigation before the Commission, and for programmers who are contemplating litigation to vindicate their rights. Proposed change to Section 76.1302:

(c) *Contents of Complaint* (5) "Prima facie case" means that the complainant shall put before the Commission evidence of the elements of the discrimination offense, supported as appropriate by documents and testimony by declaration or affidavit, that, if subsequently found to be true by a finder of fact, would be sufficient to establish a violation under this section.

3. Prohibition against retaliation

It is important that the Commission make it clear that MVPD discrimination in the form of retaliation against independent programmers for their lawful assertion of their rights will not be tolerated, whether before, during or after carriage. Proposed change to Section 76.1301:

(c) *Discrimination*. [Add the following at the end of subsection c] A multichannel video programming distributor's refusal to deal, or refusal to negotiate in good faith, with a non-affiliated video programming provider because of the latter's assertion of rights or remedies under this Subpart shall constitute discrimination.

4. Stay During Litigation

Independent programmers who have carriage and are offering their programming to cable or DBS subscribers may suffer discrimination in the terms or conditions of carriage. For example, after the network has made substantial investments and commitments in programming, and entered into advertising and other arrangements, the MVPD may seek to favor affiliated programming by "re-tiering" the independent programmer to an expensive or unpopular tier with reduced viewership and revenue during or after an initial term of the carriage agreement. Proposed change to Section 76.1302:

Insert before existing subsection (g) and renumber accordingly:

(g) *Stay during litigation:* Upon a complainant's filing of a complaint alleging discrimination with respect to a change in the terms or conditions of carriage, any such change shall be null and void and the terms and conditions of carriage shall revert to *status quo ante* for the duration of the pendency of the Commission's decision upon such complaint.